



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**BY E-MAIL, FAX, & FIRST CLASS MAIL**

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**FEB - 6 2013**

RE: MUR 6718  
(formerly Pre-MUR 520)

Dear Mr. Gober:

In the normal course of carrying out its supervisory responsibilities, the Federal Election Commission (the "Commission") received information suggesting that your clients, John E. Ensign, Ensign for Senate and Lisa Lisker in her official capacity as treasurer, and Battle Born PAC and Lisa Lisker in her official capacity as treasurer (collectively "Senator Ensign and the Ensign Committees"), may have violated the Federal Election Campaign Act of 1971, as amended (the "Act"). On May 19, 2011, Senator Ensign and the Ensign Committees were notified that the information was being reviewed by the Commission's Office of the General Counsel for possible enforcement action under 2 U.S.C. § 437g. On February 5, 2013, the Commission found reason to believe that Senator Ensign and the Ensign Committees violated two provisions of the Act, 2 U.S.C. §§ 434(b) and 441a(f), by knowingly accepting excessive contributions from Michael and Sharon Ensign and failing to report them. Enclosed is the Factual and Legal Analysis that sets forth the basis for the Commission's determination.

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In the meantime, this matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public.

Please note that Senator Ensign and the Ensign Committees each have a legal obligation to preserve all documents, records, and materials relating to this matter until notified that the Commission has closed its file in this matter. *See* 18 U.S.C. § 1519.

We look forward to your response.

On behalf of the Commission,



Ellen L. Weintraub  
Chair

Enclosures  
Factual and Legal Analysis

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# BEFORE THE FEDERAL ELECTION COMMISSION

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Respondents:

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John E. Ensign,

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Ensign for Senate and Lisa Lisker

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in her official capacity as treasurer, and

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Battle Born Political Action Committee

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and Lisa Lisker in her official capacity

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as treasurer

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MUR 6718

(formerly Pre-MUR 520)

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## FACTUAL AND LEGAL ANALYSIS<sup>1</sup>

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On or about April 7, 2008, Cynthia Hampton and members of her family received a

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\$96,000 payment from a trust account controlled by Michael and Sharon Ensign. Cynthia

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Hampton had been the treasurer of two political committees associated with former Senator John

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E. Ensign—Ensign for Senate, Senator Ensign's authorized candidate committee (the

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"Committee"), and the Battle Born PAC, Senator Ensign's leadership PAC (the "PAC")

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(collectively the "Ensign Committees")—but had to leave that position after she and Senator

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Ensign revealed their extra-marital affair to their families.<sup>2</sup> After a 22-month investigation, the

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U.S. Senate Select Committee on Ethics (the "Senate Ethics Committee") concluded there was

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"substantial credible evidence" that part of that payment was a severance and therefore

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constituted an unlawful and unreported campaign contribution.<sup>3</sup>

<sup>1</sup> In the course of carrying out its supervisory responsibilities, the Federal Election Commission (the "Commission") received information that resulted in the initiation of this matter. See 2 U.S.C. § 437g(a)(1).

<sup>2</sup> Cynthia Hampton was the Treasurer for the Ensign Committees at all relevant times. After the activities giving rise to this matter, Lisa Lisker replaced Hampton as Treasurer for both committees. Accordingly, Lisker, in her capacity as treasurer, was identified as a Respondent in this matter. See Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 3 (Jan. 3, 2005).

<sup>3</sup> Special Counsel's Report of the Preliminary Inquiry Concerning Senator John E. Ensign (May 10, 2011) (the "Report"), available at <http://ethics.senate.gov/public/index.cfm/pressreleases?id=451c2d6e-643f-4026-b7e4-3f6587fcc2dc>.

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1 In 2010, the Commission considered these allegations in a complaint-generated matter,  
2 MUR 6200 (Ensign). In connection with that matter, Senator Ensign and his parents, Michael  
3 and Sharon Ensign, each filed sworn affidavits with the Commission stating that the payment  
4 was not a severance but a gift. They represented that the payment was a gift from Michael and  
5 Sharon Ensign to the Hampton family made "out of concern for the well-being of long-time  
6 family friends" after learning of the affair.<sup>4</sup> The Commission relied on the veracity of those  
7 sworn affidavits—which at the time provided the Commission with the "only direct evidence of  
8 [the Ensigs'] intent" in making the payment—and concluded that the affidavits supported a  
9 conclusion that the payment was a gift.<sup>5</sup> On that basis, the Commission exercised its  
10 prosecutorial discretion to dismiss the complaint, explaining, "[I]t is doubtful that an  
11 investigation would produce any additional evidence that would contradict or outweigh" the  
12 affidavits.<sup>6</sup>

13 The Commission now has received substantial new evidence, including the transcripts of  
14 sworn deposition testimony from many of those with direct personal knowledge of the relevant  
15 events and numerous relevant documents. This new evidence casts considerable doubt on the  
16 credibility of the Ensigs' affidavits. And this new evidence supports the conclusion that part of  
17 the payment—\$72,000—was meant, among other things, to compensate Cynthia Hampton for  
18 the termination of her employment as Treasurer of the Ensign Committees.

19 Because a third party's payment of a political committee's costs for employee salaries,  
20 benefits, and expenses, including an employee's severance, is a contribution under the Federal

<sup>4</sup> Michael Ensign Aff. ¶ 6; Sharon Ensign Aff. ¶ 6.

<sup>5</sup> See Statement of Reasons, Comm'rs Petersen, Bauerly, Hunter, McGahn & Weintraub at 10-11, MUR 6200 (Ensign) (Nov. 17, 2010) ("SOR").

<sup>6</sup> *Id.*

1 Election Campaign Act (the "Act"), the \$72,000 in severance payments to Cynthia Hampton  
2 constituted an excessive unreported contribution to the Ensign Committees. Accordingly, the  
3 Commission finds reason to believe that Senator Ensign and the Ensign Committees knowingly  
4 excessive in-kind contributions from Michael and Sharon Ensign, in violation of 2 U.S.C. §  
5 441a(f). The Commission also finds reason to believe that the Committee and the PAC failed to  
6 report the contributions they received from Michael and Sharon Ensign, in violation of 2 U.S.C.  
7 § 434(b).

8 **I. FACTUAL SUMMARY**

9 Senator Ensign was elected to the U.S. Senate in 2000 and was re-elected in 2006.  
10 Cynthia Hampton became the assistant treasurer of the Committee in June 2004 and replaced the  
11 former treasurer after the 2006 election. She also had been an assistant treasurer of the PAC, and  
12 was named its treasurer in February 2008.<sup>7</sup> Cynthia Hampton's salary for her treasurer positions  
13 with the Committee and the PAC was "approximately \$50,000 a year."<sup>8</sup> Douglas Hampton, her  
14 husband, served as Senator Ensign's Administrative Assistant and Co-Chief of Staff from  
15 November 2006 to April 2008.<sup>9</sup> The Commission has information that his annual salary was  
16 between \$160,000 and \$170,000.

17 Information available to the Commission also indicates that the Hampton family and  
18 Senator Ensign and his wife Darlene Ensign had a close personal relationship for many years.  
19 Cynthia Hampton and Darlene Ensign were friends in high school and later introduced their  
20 husbands to each other. After the Hampton family moved to Las Vegas in 2004, the families

<sup>7</sup> See Sen. Ensign Resp. at 3; Report at 10-11.

<sup>8</sup> See Cynthia Hampton Dep. at 73 (Mar. 21, 2011).

<sup>9</sup> See *id.* at 51.

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1 resided in adjacent neighborhoods, spent a great deal of time together, sent their children to the  
2 same private school, and the families were described by others as "best friends."<sup>10</sup>

3 The families' financial circumstances, however, were very different. Senator Ensign's  
4 father had been a successful businessman and provided Senator Ensign with substantial financial  
5 support.<sup>11</sup> Senator and Darlene Ensign repeatedly gave the Hamptons financial help, including  
6 refinancing the Hamptons' home in 2004 and 2006, paying the private school tuition of the  
7 Hampton children, and funding expensive golf outings.<sup>12</sup>

8 **A. The Negotiation of a Severance as Part of an "Exit Strategy"**

9 In or around December 2007, Senator Ensign and Cynthia Hampton began an extra-  
10 marital affair, which continued through August 2008. In a deposition, Cynthia Hampton testified  
11 that around April 1, 2008, after the Ensign and Hampton families learned about the affair, it  
12 became evident that she and Doug Hampton would have to leave their jobs.<sup>13</sup> Senator Ensign  
13 and Doug Hampton then negotiated an "exit strategy" to end the employment relationship.<sup>14</sup>

14 On April 2, Doug Hampton and Senator Ensign had three conversations to discuss this  
15 exit plan.<sup>15</sup> Doug Hampton took detailed notes. Dated "4/2/08," they provide a  
16 contemporaneous account of the negotiations.<sup>16</sup> During her deposition, Cynthia Hampton

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<sup>10</sup> Michael Ensign Dep. at 44 (Mar. 16, 2011) ("They were always there. They were best friends. And the kids were best friends . . . . They went to school together, were on the golf team together.")

<sup>11</sup> *Id.* at 10-11, 21, Ex. ME-2; Report at 45.

<sup>12</sup> Cynthia Hampton Dep. at 57-63, 80-81, 106-07.

<sup>13</sup> *See id.* at 201-02, 214.

<sup>14</sup> *Id.*

<sup>15</sup> *See id.* at 204-06, 208, 210-14, Ex. CH-10.

<sup>16</sup> *See id.*, Ex. CH-10; *see also* Eric Lichtblau and Eric Lipton, *Senator's Aid After Relationship Raises Flags Over Ethics*, N.Y. TIMES, Oct. 2, 2009 (describing contemporaneous notes and further describing course of negotiations between Senator Ensign and Hamptons regarding severance payment to leave jobs with Senate office)

1 verified that the notes were in Doug Hampton's handwriting and stated that he "would always  
2 record everything."<sup>17</sup>

3 The first of the three April 2 discussions occurred at 9:40 a.m., and the notes of this  
4 discussion state: "Exit strategy and *severance* for Cynthia, Exit strategy and *severance* for Doug,  
5 Communication Plan for NRSC and official office, NO CONTACT WHAT SO EVER [*sic*]  
6 WITH CINDY!"<sup>18</sup> The notes reflect that the second conversation took place at noon. At that  
7 time, Senator Ensign and Doug Hampton discussed a plan to obtain clients for Doug Hampton in  
8 his new work, with the notes recording: "We discussed timing of departure[;] JE [John Ensign]  
9 agreed for me to stay on thru April—Better for client building."<sup>19</sup> Finally, the notes describe a  
10 third conversation at 7:30 p.m., during which Senator Ensign proposed specific details about the  
11 nature and amount of the proposed payment to the Hamptons:

12 John called asked if it was OK to share the outlines of a plan.

13 —Doug ~ 2 mn. *severance*, continue client building

14 —Cindy ~ 1 year *salary*

15 —Discussed gift rules and tax law

16 —Shared a plan to have both he and Darlene write ck's in various  
17 amounts equaling 96K.

18 He asked if the offer was OK and did I agree—I said I would need to think about  
19 and would get back with him.<sup>20</sup>

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and Ensign Committees), available at  
[http://www.nytimes.com/2009/10/02/us/politics/02ensign.html?\\_r=2&scp=1&sq=Ensign%20Hampton&st=cse&](http://www.nytimes.com/2009/10/02/us/politics/02ensign.html?_r=2&scp=1&sq=Ensign%20Hampton&st=cse&)

<sup>17</sup> See Cynthia Hampton Dep. at 204. While the 2009 *New York Times* article described Doug Hampton's notes and copies of them were publicly available at that time, Cynthia Hampton authenticated them during her deposition testimony.

<sup>18</sup> *Id.*, Ex. CH-10 (emphasis added).

<sup>19</sup> *Id.*

<sup>20</sup> See Michael Ensign Dep., Ex. ME-7 (emphasis added).



**B. The \$96,000 Payment**

Cynthia Hampton testified that, during the first week of April, Senator Ensign told her the check had been written and described how the amount was calculated:

[Senator Ensign] did contact me and tell me the check was written because . . . when Doug and him had a meeting, . . . they had talked that we both have to stop working there, John . . . told Doug and myself that he would give me—at first he told me two years *severance pay* and Doug . . . I don't remember if it was a month *severance pay*. . . . I don't recall, because it didn't make sense to me, because then [when the check arrived] I got ~~one~~ year's *severance pay*, which was the \$50,000. And I remember if it was ~~one~~ or two months' salary for Doug, that . . . there was extra money, and I said, well, if it's . . . one year for me and one or two months, whatever it was for Doug, what's the extra? And he said well, you can put that towards your health insurance. You'll be getting a check from Darlene and I, is what he told me.<sup>21</sup>

She also recalled discussing tax consequences: "I do vaguely remember John saying that . . . he wouldn't go over a certain amount so we wouldn't have to pay taxes on it."<sup>22</sup>

During her deposition, Cynthia Hampton also recalled that during the period between the discussions on April 2 and her receipt of the \$96,000 check on April 9, Senator Ensign repeatedly attempted to contact her to determine whether she had received the payment. "I remember him trying to call me or e-mail me saying did you get the check yet, did you get the check yet."<sup>23</sup> When she received the check, Cynthia Hampton notified Senator Ensign "because he kept asking me, have you received the check yet?"<sup>24</sup> She also testified, "[W]hen I got it, I was

<sup>21</sup> Cynthia Hampton Dep. at 202-03 (emphasis added).

<sup>22</sup> *Id.* at 211.

<sup>23</sup> *See id.* at 203-04.

<sup>24</sup> *Id.* at 212.

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1 surprised that it wasn't from John and Darlene, that it said Bruce Hampton, the trust fund  
2 account."<sup>25</sup>

3 Bruce Hampton, who is not related to the Hamptons, administers the Ensign 1993 Trust,  
4 which belongs to Michael and Sharon Ensign and contains the bulk of their wealth.<sup>26</sup> Bruce  
5 Hampton testified that, on April 7—five days after Senator Ensign's negotiations with Doug  
6 Hampton—Michael Ensign instructed him to write a \$96,000 check from the Ensign 1993 Trust  
7 account to Doug and Cynthia Hampton and two of their three children.<sup>27</sup>

8 **C. Senator Ensign's Discussion with his Father and the \$96,000 Check to the**  
9 **Hamptons from the Ensign 1993 Trust Account**

10 Recalling the events of early April 2008, Senator Ensign wrote in his journal in June  
11 2009—just over a year after the payment and at the time when the affair was becoming public—  
12 that because he and Cynthia Hampton had been caught several times, "finally all agreed that  
13 Doug and Cindy would have to leave my employ."<sup>28</sup> Ensign then described his desire to pay a  
14 severance and his discussion with his father Michael Ensign about making a payment to the  
15 Hamptons:

16 I did not want the government to have to pay any severance pay[,] or the  
17 campaign, so I was going to help them transition into their new life. *I went to my*  
18 *dad, and he said he would rather give them some money as a gift to help them out.*  
19 *He had Bruce write a check for about \$100,000.*<sup>29</sup>

20 Asked about this conversation during his deposition, Michael Ensign ultimately could not  
21 recall whether Senator Ensign asked him to make this payment to the Hamptons. Michael

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<sup>25</sup> *Id.* at 203-04.

<sup>26</sup> Bruce Hampton Dep. at 22-23 (Mar. 15, 2011).

<sup>27</sup> *Id.* at 106.

<sup>28</sup> Michael Ensign Dep., Ex. ME-10 at 1.

<sup>29</sup> *Id.* (emphasis added).

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1 Ensign first testified, "No one at any time asked me to pay anybody anything, period. My wife  
2 and I decided to give that money to the Hampton family because we were very concerned about  
3 this whole situation and primarily our grandchildren and the Hampton children."<sup>30</sup> But after  
4 reviewing Senator Ensign's journal entry, excerpted above, which is to the contrary, Michael  
5 Ensign testified that he could not recall a conversation with his son about a "need to compensate  
6 [the Hamptons] in some way for the damage that was being caused to them by the loss of their  
7 jobs." He continued, "I don't recall a conversation. . . . He [Senator Ensign] may have  
8 mentioned it. I can honestly tell you today, I don't recall him saying that to me."<sup>31</sup> When  
9 counsel tried to elicit other details about how Michael Ensign, rather than his son, came to be the  
10 source for the payment—asking, for instance, whether he learned that his son intended to pay the  
11 Hamptons as a gift and then offered to make the payment himself because of his superior  
12 financial position—Michael Ensign again could not recall but insisted the payment was a gift:

13       It was just intended as a gift, so I don't recall what we were thinking. . . . The  
14       intent of that was just to give primarily for the concern over those kids. That's  
15       exactly what it was. And that's what the intent was, as far as I'm concerned,  
16       okay.<sup>32</sup>

17 Michael Ensign also testified that after he learned of the affair he "had assumed" but "wasn't  
18 told" that Doug and Cindy Hampton would no longer work for Senator Ensign going forward.<sup>33</sup>

19       Asked about these same issues, Michael Ensign's wife and Senator Ensign's mother  
20 Sharon Ensign testified that she and her husband were concerned about the lost income the

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<sup>30</sup> Michael Ensign Dep. at 96.

<sup>31</sup> *Id.* at 106.

<sup>32</sup> *Id.* at 105-06.

<sup>33</sup> *Id.* at 81-82.

1    Hamptons would suffer after leaving their jobs and the impact that would have on the Hampton  
2    children:

3            Q:     . . . [A]fter meeting with John, do you recall the sequence of events of  
4            what happened next leading up to your husband directing Bruce Hampton to write  
5            a check to the Hamptons?

6            A:     . . . [M]y husband suggested it. And . . . obviously, we knew about the  
7            affair and knew that . . . they were . . . obviously going to have to seek  
8            employment elsewhere. And just—it was the right thing to do so that . . . their  
9            children would not, you know, have to leave their schools or anything else.<sup>34</sup>

10    Sharon Ensign also stated that she “did not recall ever discussing” a potential severance with  
11    Senator Ensign and that Senator Ensign never asked for a check to serve as severance.<sup>35</sup> Sharon  
12    and Michael Ensign both testified that they never communicated with Cynthia or Doug Hampton  
13    about the payment, whether to convey their concern or for any other purpose.<sup>36</sup>

14            **D.     Senator Ensign Repeatedly Referred to the Payment as “Severance”**

15            Members of Senator Ensign’s Senate office staff testified that Senator Ensign repeatedly  
16    referred to the planned payment as “severance,” or as related to the Hamptons’ lost employment,  
17    during the time leading up to public disclosure of the affair in June 2009:

18            •    Rebecca Fisher, Senator Ensign’s Communications Director: “[H]e had just said  
19            that he had taken care of Doug with what he had thought was pay, was fair pay,”  
20            and “[H]e had said a couple times, ‘I was trying to make them whole, I was trying  
21            to be fair, I was trying to *make sure they were taken care of after he left the*  
22            *office’ . . . .”<sup>37</sup>*

<sup>34</sup>     Sharon Ensign Dep. at 45.

<sup>35</sup>     *Id.* at 47-48, 52-53.

<sup>36</sup>     *Id.* at 44-45; Michael Ensign Dep. at 109-10.

<sup>37</sup>     Rebecca Fisher Dep. at 34, 45 (Jul. 6, 2010) (emphasis added).

- Ernestine Jackson, Senator Ensign's Deputy Chief of Staff: "I recall him saying that he gave them money out of his own pocket for a few months—he said for a few months *to cover his salary and her salary and COBRA payments*."<sup>38</sup>
- Pamela Thiessen, Senator Ensign's Legislative Director: "He said he had paid *severance* to the Hamptons, and he talked about a number of different things it included, including enough money for COBRA benefits."<sup>39</sup>

The Report also recounts that other witnesses testified about Senator Ensign's contemporaneously expressed purpose to pay the Hamptons severance. For instance, a long-time spiritual advisor to Senator Ensign reportedly testified that when he spoke with Senator Ensign about the payment to the Hamptons, Senator Ensign stated, "I'm going to give him as much *severance* as possible." Similarly, Mike Slanker, a former Ensign campaign manager, reportedly testified that Senator Ensign told him, "[W]e gave Cindy \$100,000 *severance* to help them."<sup>40</sup>

And multiple drafts of a public statement concerning the affair, which Senator Ensign prepared with help from his staff, described the payment to the Hamptons as severance:

Because of the affair, an unsustainable work atmosphere had developed and it became apparent they could no longer work for me. To help them transition to new work, we gave them what was the equivalent of 6 months['] *severance* pay and 1 year of health insurance expense—personally, not out of campaign or official accounts.<sup>41</sup>

According to the Report, another draft of the public statement circulated to key Ensign staff members by e-mail included similar "severance" language. In this draft, however, Senator Ensign claimed that he and his wife made the payment: "Last year, my wife and I decided to give what would be the equivalent of six months['] *severance* to each of them out of our personal

<sup>38</sup> Ernestine Jackson Dep. at 223 (Jul. 1, 2010) (emphasis added).

<sup>39</sup> Pamela Thiessen Dep. at 87 (Jun. 16, 2010) (emphasis added).

<sup>40</sup> Report at 39, 56 (emphasis added).

<sup>41</sup> *Id.* at 40 (emphasis added).

1 funds. Let me be clear: These were strictly personal funds. This was to get them transitioned  
2 into new work."<sup>42</sup>

3 Senator Ensign made the decision to remove all references to the payment from his public  
4 statement less than two hours before releasing it on June 16, 2009. He did so only after his  
5 lawyer informed a member of Senator Ensign's staff that Senator Ensign could have legal  
6 exposure if the payment to the Hamptons was perceived to be a "severance."<sup>43</sup> Senator Ensign's  
7 attorney counseled him not to describe the payment directly in relation to the termination of the  
8 Hamptons' employment, but to use more opaque language so that Senator Ensign could later  
9 mount a defense, if necessary:

10 This statement, as currently written, raises a host of potential criminal issues for  
11 the Senator. *The language draws a direct connection between the affair, the*  
12 *termination of the staffers, and the "severance payment."* Although the statement  
13 attempts to legitimize the reason for the payment, it's awfully odd that he made  
14 the payments from personal funds.

15 . . . .

16 The Hamptons may very well come back with more information regarding the  
17 payments, *but the Senator can dispute the charges on our terms (essentially*  
18 *stating that the Senator made the payments because he regretted his actions and*  
19 *wanted to make amends, but would not play Doug Hampton's game of criminal*  
20 *extortion.)*<sup>44</sup>

21 As the Report explains, the first time Senator Ensign publicly acknowledged a payment  
22 to the Hamptons was also the first time it was described as a gift from Michael and Sharon  
23 Ensign. In a public statement issued on July 9, 2009—after Doug Hampton stated in a media

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<sup>42</sup> *Id.* at 40-41 (emphasis added).

<sup>43</sup> See Rebecca Fisher Dep. at 112; Report at 42. According to the Report, the e-mail from counsel was sent to a shared commercial internet-based email address of a third party—Senator Ensign's then-Communications Director and her husband—not Senator Ensign, and thus was not privileged. Senator Ensign reportedly abandoned his claim of privilege in February 2011 after the Senate Ethics Committee challenged it. Report at 41. Counsel for Senator Ensign has not asserted any claim of privilege regarding this e-mail in this proceeding.

<sup>44</sup> E-mail from Chris Gober, Esq., to Rebecca Fisher (Jun. 16, 2009, 3:26 p.m.) (emphasis added).

1 interview that his wife received a payment from Senator Ensign—Senator Ensign’s attorneys  
2 said, on his behalf, “The payments were made as *gifts*, accepted as gifts and complied with tax  
3 rules governing gifts. After the Senator told his parents about the affair, his parents decided to  
4 make gifts out of concern for the well-being of long-time family friends during a difficult  
5 time.”<sup>45</sup>

6 **E. The Asserted Pattern of “Sizeable Gifts” from Michael and Sharon Ensign to**  
7 **the Hamptons**

8 During the Senate Ethics Committee proceeding, and during the Commission’s  
9 consideration of MUR 6200 in 2010, the Ensigs attempted to establish that Michael and Sharon  
10 Ensign engaged in a pattern of gift giving to the Hampton family. The proof of that conduct  
11 centered on a vacation in Hawaii attended by Senator Ensign’s family, the family of Senator  
12 Ensign’s brother, and the Hampton family. While in Hawaii, Senator Ensign’s brother’s family  
13 and the Hampton family stayed together in a rented home and Senator Ensign’s family stayed in  
14 a private home.<sup>46</sup> Michael and Sharon Ensign provided affidavits in MUR 6200 stating:

15 Senator and Darlene Ensign, as well as Sharon and I, have made sizeable gifts to  
16 the Hampton family over the term of their shared friendship. For example,  
17 Sharon and I paid for the Hampton family to vacation in Hawaii from December  
18 26, 2006, to January 2, 2007, which included their flights on a private Gulfstream  
19 4SP jet, a rental home with its own private 9-hole golf course, food, and  
20 recreational activities. Although I have not undertaken an accounting of the total  
21 cost of the trip, I believe the costs that could be allocated to the Hamptons was at  
22 least \$30,000.<sup>47</sup>

23 After examining his affidavit during a subsequent deposition, however, Michael Ensign  
24 contradicted this sworn statement. He testified, “We let them use the airplane, that’s it. So I

<sup>45</sup> Report at 42 (emphasis added).

<sup>46</sup> See *id.* at 45.

<sup>47</sup> Sen. Ensign Resp., Exs. B, C.

1 don't recall—I don't recall anything else there. And I absolutely did not pay anything in Hawaii,  
2 talking about a home and a golf course and food. No, none of that, paid nothing.”<sup>48</sup>

3 In the wake of these inconsistent statements during Michael Ensign's deposition, Sharon  
4 Ensign produced copies of two checks totaling \$50,000 from her personal checking account  
5 made out to Citibank.<sup>49</sup> She also produced two redacted pages of what appears to be Senator  
6 Ensign's Citibank MasterCard statement from January 2007 showing numerous charges for  
7 expenses incurred by those participating in the Hawaiian trip.<sup>50</sup> After receiving these documents,  
8 which were not accompanied by further explanation, the Senate Ethics Committee inferred that  
9 Sharon Ensign “may have deposited approximately \$50,000 into Senator Ensign's bank or credit  
10 card account” around the time that the Hawaiian vacation took place.<sup>51</sup> It has been suggested to  
11 the Commission that Sharon Ensign paid the balance on Senator Ensign's credit card bill, which  
12 Senator Ensign had used to pay for the Hamptons' vacation in Hawaii.

13 There is evidence showing that Michael and Sharon Ensign had a long history of  
14 providing money to Senator Ensign. Michael and Sharon Ensign gave Senator Ensign \$300,000

<sup>48</sup> Michael Ensign Dep. at 103. When asked generally to explain this and other apparent contradictions between his deposition testimony and his affidavit in MUR 6200, Michael Ensign testified that he had not carefully reviewed the affidavit before signing it. *Id.* at 121-22. For her part, Sharon Ensign testified during her deposition that she did not recall paying for the Hawaiian trip. *See* Sharon Ensign Dep. at 56-60.

<sup>49</sup> *See* Sen. Ensign Resp., Ex. P (copies of checks to Citibank dated 12/21/06 and 1/07/07).

<sup>50</sup> *See id.*, Ex. K (redacted Citibank credit card bill).

<sup>51</sup> Report at 45. Sharon Ensign testified that she does not remember helping financially with the trip to Hawaii at all, and that she does not recall ever giving Senator or Darlene Ensign any checks from any source other than the Ensign 1993 Trust (though the checks submitted came from Shmua Ensign's personal checking account rather than the Ensign 1993 Trust). Sharon Ensign Dep. at 56-58. She also did not appear to have any knowledge of any specific charges that her checks may have covered. *Id.* Thus, it appears that, although Michael and Sharon Ensign ultimately paid for credit card and other expenses related to this group Hawaii trip, some of which benefited the Hamptons, they may have been unaware that they did so.



1 in 2006; \$400,000 in 2007; and \$300,000 in 2008, 2009, and 2010.<sup>52</sup> Michael Ensign testified  
2 that he and his wife “try to keep all of our children at the same standard of living, and we provide  
3 the funds for that. My son Bill and my son David are wealthy people, and they make a lot of  
4 money, and my daughter and her husband and my son John and his wife do not. And we try to  
5 keep that in balance.”<sup>53</sup>

6 Moreover, although Senator and Darlene Ensign had a long-standing and close-knit  
7 relationship with the Hamptons, Michael and Sharon Ensign testified that Michael Ensign did not  
8 consider Doug Hampton to be a friend.<sup>54</sup> When asked whether Michael Ensign had a “negative  
9 impression” of Doug Hampton, Sharon Ensign agreed, explaining that she thought Michael  
10 Ensign believed Doug Hampton was “an opportunist” and Michael Ensign had a “general  
11 negative feeling” about him.<sup>55</sup> Michael Ensign testified that it was fair to say he was “not  
12 terribly fond” of Doug Hampton and that his concern about Doug Hampton had to do with  
13 alleged “substance abuse problems” and his belief that Doug Hampton also allegedly “had some  
14 problems that he had taken money from a church and those type of things.”<sup>56</sup> Cynthia Hampton  
15 testified that Michael Ensign’s dislike of Doug Hampton went back some 20 years to an episode  
16 in which Michael Ensign felt Doug Hampton had “oversold him and wasn’t honest about—

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<sup>52</sup> See Report at 45; see also Michael Ensign Dep., Ex. ME-2. Michael Ensign testified that the disbursement in 2008 was not reduced by \$100,000 because of the \$96,000 payment to the Hamptons. See Michael Ensign Dep. at 28.

<sup>53</sup> *Id.* at 21.

<sup>54</sup> See *id.* at 43 (“No, he was just a very best friend of John and Darlene’s. The Hampton family was extremely close to my son John and his family”); Sharon Ensign Dep. at 38.

<sup>55</sup> Sharon Ensign Dep. at 38.

<sup>56</sup> Michael Ensign Dep. at 107-08.

1 didn't tell him the prices" in the sale of some tailored clothing, "[a]nd from that day forward, he  
2 has never liked Doug . . . . Once you're on his bad side, that's it. I call him the godfather."<sup>57</sup>

3 **F. In Their Response Senator Ensign and the Ensign Committees Argue that**  
4 **the \$96,000 Payment Was a Gift Unrelated to Cynthia Hampton's**  
5 **Termination from the Ensign Committees**

6 After the Commission notified them of this matter, Senator Ensign and the Ensign  
7 Committees filed a joint response (the "Sen. Ensign Response"). It includes a number of  
8 arguments in response to the conclusions described in the Report:

- 9 • Michael and Sharon Ensign intended to give a gift, as shown by their statements  
10 in their affidavits and by the fact that they structured the payments to fit within  
11 gift tax laws.
- 12 • Whether the \$96,000 was a gift does not depend on whether Michael and Sharon  
13 Ensign had given the Hamptons a large financial gift before.
- 14 • While the donor's intent, and not the Hamptons' understanding of the nature of  
15 the payment, defines the payment, if the Hamptons believed this money to be  
16 severance, they should have declared the money as income on their tax return.
- 17 • Senator Ensign's frequent "incorrect" references to the term "severance" when  
18 referring to the payment are not determinative of Michael and Sharon Ensign's  
19 intentions.
- 20 • Variations in how witnesses described the "severance" payment in testimony to  
21 the Senate Ethics Committee should cast doubt on the reliability of characterizing  
22 the payment as a severance at all.
- 23 • These gifts would have been given irrespective of Senator Ensign's 2012 Senate  
24 candidacy, so the payment does not trigger a violation of the personal use  
25 regulations at 11 C.F.R. § 113.1(g)(6).<sup>58</sup>

26 In addition, the Sen. Ensign Response describes a history of other financial gifts from  
27 Senator and Darlene Ensign to the Hampton family.<sup>59</sup> It then goes on to state that Senator

<sup>57</sup> Cynthia Hampton Dep. at 54-55.

<sup>58</sup> Sen. Ensign Resp. at 10-21.

<sup>59</sup> *Id.* at 3-4.

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1 Ensign did not request that Michael or Sharon Ensign make the payment at issue in this case, nor  
2 was there any explicit discussion that the payment would function as severance, and the payment  
3 was structured in \$12,000 increments to comply with gift tax laws.<sup>60</sup>

4 As for whether Michael and Sharon Ensign paid for the Hawaiian trip as a gift to the  
5 Hamptons, the Sen. Ensign Response contends that the checks signed by Sharon Ensign and  
6 credit card bills showing Hawaiian trip expenses—documents produced to the Senate Ethics  
7 Committee—rebut Michael Ensign’s testimony denying that they paid for the trip.<sup>61</sup> The Sen.  
8 Ensign Response also asserts that Senator Ensign recalls three other occasions when he and his  
9 wife brought the Hampton family on trips and vacations using Michael and Sharon Ensign’s  
10 private plane or vacation homes. Because they used the plane, the Sen. Ensign Response asserts  
11 that these other trips are additional “gifts” from Michael and Sharon Ensign to the Hampton  
12 family.<sup>62</sup>

13 Finally, the Sen. Ensign Response contends that the Commission should dismiss this  
14 matter as it did in MUR 6200 because the Senate Ethics Committee’s investigation did not  
15 identify any new evidence that merits a different result in this matter.<sup>63</sup>

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<sup>60</sup> See *id.* at 4.

<sup>61</sup> *Id.* at 8-9.

<sup>62</sup> See *id.* at 10 n.5. Notably, the Sen. Ensign Response does not contend that Michael or Sharon Ensign were aware that the Hamptons benefitted from the use of their plane.

<sup>63</sup> *Id.* at 1-2.

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**II. LEGAL ANALYSIS**

**A. The Commission Has New Evidence that Casts Serious Doubt on the Reliability of the Ensign Affidavits on Which the Commission Previously Relied in its Consideration of MUR 6200**

In MUR 6200, the Commission exercised its discretion and dismissed the complaint for reasons that have since been overtaken by the new evidence discussed above. First, the Commission gave primary weight to the Ensigns' sworn affidavits, describing them as "the only direct evidence of their intent in making the payment."<sup>64</sup> But new evidence indicates that certain representations in the affidavits were misleading.

**1. The Notes, Journal Entry, and Other Documents Referring to the Payment as a Severance**

Senator Ensign represented that no one—and specifically not he—"suggested" that the payment from the Ensigns' trust account "would or should function, in form or substance," as a severance.<sup>65</sup> But Senator Ensign's journal calls the payment a "severance"; Doug Hampton's notes show the payment he was negotiating with Senator Ensign was a "severance"; and multiple drafts of Senator Ensign's public statement called it a "severance."<sup>66</sup>

**2. Testimony of Cynthia Hampton and Members of Senator Ensign's Staff Showing the Payment Was Understood to be a Severance**

Testimony given by Cynthia Hampton and members of Senator Ensign's staff also reflect that Senator Ensign referred to the payment as a "severance" from the time he negotiated it in April 2008 until he issued a public statement disclosing the relationship, but not the payment, in

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<sup>64</sup> SOR at 10-11.

<sup>65</sup> John Ensign Aff. ¶ 5.

<sup>66</sup> See Michael Ensign Dep., Ex. ME-10 (journal entry referring to payment of "severance"); Cynthia Hampton Dep., Ex. CH-10 (Doug Hampton's notes recording discussion with Senator Ensign of "severance" payment); Report at 40 (discussing initial Ensign draft of public statement describing "severance pay" to Hamptons).

1 June 2009, more than a year later.<sup>67</sup> Indeed, Sharon Ensign testified, “[O]bviously, we knew  
2 about the affair and knew that . . . *they were . . . obviously going to have to seek employment*  
3 *elsewhere*. And just—it was the right thing to do so that . . . their children would not, you know,  
4 have to leave their schools or anything else.”<sup>68</sup>

5 Thus, Senator Ensign’s repeated references to the payment as a severance—in documents  
6 as well as discussions with multiple witnesses—and a near universal understanding of the  
7 payment to be related to Cynthia Hampton’s lost job cast serious doubt on the affidavit’s denial  
8 that severance was even “suggested.”

9 3. The Evidence Showing Senator Ensign’s Request that his Father  
10 Make the Payment

11 Senator Ensign represented that no one—and specifically not he—requested that his  
12 parents “make the gifts.”<sup>69</sup> Senator Ensign’s own journal, however, records that Senator Ensign  
13 “went to [his] dad” about his desire to help the Hamptons by paying them a severance, and  
14 Michael Ensign responded by offering to “give them some money as a gift.”<sup>70</sup> And in deposition  
15 testimony, Michael Ensign at first denied that Senator Ensign requested a payment from Michael  
16 and Sharon Ensign but then stated that Senator Ensign “may have” told Michael Ensign of his  
17 intent to make a payment to the Hamptons.<sup>71</sup> Thus, while the affidavit might be accurate in the

<sup>67</sup> In fact, Senator Ensign did not stop referring to it as a severance until his counsel advised that he drop any reference connecting a payment to the Hamptons’ lost employment from his final public statement issued on June 16, 2009. And the first time he referred to it as a gift was on July 9, 2009.

<sup>68</sup> Sharon Ensign Dep. at 45 (emphasis added).

<sup>69</sup> John Ensign Aff. ¶ 4.

<sup>70</sup> See Michael Ensign Dep., Ex. ME-10 (“I did not want the government to have to pay any severance pay or the campaign. So I was going to help them transition into their new life. I went to my dad and he said he would rather give them some money as a gift to help them out. He had Bruce write the check for about 100k. . .”).

<sup>71</sup> See *id.* at 105 (saying he could not recall a conversation with Senator Ensign about paying the Hamptons but admitting that such a conversation “may have” occurred).

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1 narrow sense that Senator Ensign may not have explicitly requested that they characterize the  
2 payment as a gift, it omits the salient fact that Senator Ensign wanted to pay the Hamptons a  
3 severance and discussed the payment with his father.

4 Senator Ensign also represented that his parents “informed [him] that they made gifts”  
5 when the payment occurred in April 2008.<sup>72</sup> Yet Senator Ensign’s journal records that it was his  
6 idea—and not that of his parents—to make a payment.<sup>73</sup> Doug Hampton’s notes reflect that it  
7 was Senator Ensign who negotiated the payment amount. And Cynthia Hampton’s testimony  
8 establishes that Senator Ensign himself arranged the payment, led her to believe he was the  
9 source of it, and was persistent in making sure it was made. Thus, Senator Ensign was not  
10 merely “informed” of the payment as the affidavit claims; he was intimately involved in  
11 negotiating and arranging the payment and followed up to make sure the Hamptons received the  
12 check.

13 4. Michael and Sharon Ensign’s Testimony Undermining the Claim that the  
14 Payment Was Part of a Pattern of Gifts to the Hamptons

15 In their affidavits, Michael and Sharon Ensign represented that they “made sizeable gifts  
16 to the Hampton family” in the past and, as an example, said they “paid for the Hampton family to  
17 vacation in Hawaii” in December 2006.<sup>74</sup> In deposition testimony, however, Michael Ensign  
18 specifically denied paying for such a trip, and Sharon Ensign did not recall doing so. And while  
19 documents show that Sharon Ensign wrote checks apparently paying Senator Ensign’s credit

<sup>72</sup> John Ensign Aff. ¶ 3.

<sup>73</sup> See Michael Ensign Dep., Ex. ME-10 (journal entry describing Senator Ensign’s desire that Hampton’s receive “severance” payment to “help them transition into their new life”).

<sup>74</sup> Michael Ensign Aff. ¶ 5; Sharon Ensign Aff. ¶ 5.

1 card bill, which apparently included charges for the Hawaiian vacation, they do not show that  
2 those payments were for the purpose of paying for the Hamptons' trip.

3           5.     Circumstantial Evidence Regarding the Size of the Payment

4           The second principal reason the Commission exercised its discretion to dismiss the  
5 complaint in MUR 6200 concerns the size of the payment. In MUR 6200, the Commission noted  
6 that, given the Ensign affidavits, there was an absence of other countervailing circumstantial  
7 evidence about the nature of the payment and reasoned that \$96,000—which was almost double  
8 Cynthia Hampton's annual salary—therefore was not consistent with its characterization as a  
9 severance payment.<sup>75</sup> This conclusion too has been overtaken by the new evidence now  
10 available to the Commission. Based on that evidence, the size of the payment was not  
11 inconsistent with its characterization, in part, as a severance to Cynthia Hampton. The evidence  
12 provides substantial reason to believe that the payment was severance in connection with her lost  
13 jobs with the Ensign Committees; severance for her husband's termination from Senator  
14 Ensign's Senate staff; and to maintain medical insurance. Thus, while in MUR 6200 the  
15 Commission concluded that the size of the payment seemed to weigh against a conclusion that it  
16 was linked to Cynthia Hampton's lost employment, newly available evidence points the other  
17 way, indicating that at least part of the payment was a severance payment to Cynthia Hampton.

18           B.     **A Third Party's Payment of a Political Committee's Costs for Employee**  
19                   **Salaries and Expenses—Including an Employee's Severance—Is a**  
20                   **Contribution Under the Act**

21           Under the Act, a "contribution" includes any gift, subscription, loan, advance, or deposit  
22 of money or anything of value made by any person for the purpose of influencing any election  
23 for federal office, or payment by any person of compensation for personal services rendered by

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<sup>75</sup>       SOR at 9-10.

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1 another person without charge to a political committee for any purpose.<sup>76</sup> The Supreme Court, in  
2 a controlling opinion, has recognized that administrative support costs, which include the costs  
3 relating to committee employees, are contributions covered by the Act. As it explained in  
4 *California Medical Association v. FEC*, “[C]ontributions for administrative support clearly fall  
5 within the sorts of donations limited by [Section] 441a(a)(1)(C).”<sup>77</sup>

6 Since under the Act it is a contribution to give money to a committee so that the  
7 committee can in turn pay its administrative expenses, including committee employee salaries  
8 and related costs, it would be an in-kind contribution under the Act for a third party to pay such  
9 an expense directly.<sup>78</sup> In addition, “Expenditures made by any person in cooperation,  
10 consultation, or concert with, or at the request or suggestion of, a candidate . . . shall be  
11 considered to be a contribution to such candidate.”<sup>79</sup>

12 So, if the \$96,000 payment—or some portion of it—constitutes an administrative-  
13 support-cost contribution, then the payment, or the portion that is a contribution, must comply  
14 with the Act’s contribution limits and reporting requirements. Under the Act, no person may  
15 make a contribution to any candidate and his or her authorized political committee, such as the

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<sup>76</sup> 2 U.S.C. § 431(8)(A).

<sup>77</sup> *Cal. Med. Ass’n v. FEC*, 453 U.S. 182, 198 n.19 (1981) (plurality opinion). Though a plurality, the concurrence and dissent diverged on grounds unrelated to the present issue, *i.e.*, the treatment of administrative support costs as contributions under the Act. *See Cal. Med.*, 453 U.S. at 201-09.

<sup>78</sup> *See, e.g.*, MUR 5408 (Sharpton) (2009) (accepting conciliation agreement with candidate and committee after determining that third party’s direct payments to campaign vendors and consultants constituted impermissible in-kind contributions); MUR 6023 (John McCain 2008, *et al.*) (arguing that a third party’s payment of severance to former employee who was working for committee is in-kind contribution to committee if payment is not for *bona fide* services to third party). *Cf.* MUR 6463 (Antaramian) (2012) (providing committee with office space and related office services constituted contribution to committee).

<sup>79</sup> 2 U.S.C. § 441a(a)(7)(B)(i). Under the Act, the term “expenditure” includes any direct or indirect payment, distribution, loan, advance deposit, or gift of money, or any services, or anything of value, made by any person for the purpose of influencing any election for federal office. *Id.* § 431(9)(A)(i).



1 Ensign for Senate Committee, exceeding \$2,000 (adjusted for inflation).<sup>80</sup> Likewise, no person  
2 may contribute more than \$5,000 per year to a leadership PAC, such as the Battle Born PAC.<sup>81</sup>  
3 A committee's knowing receipt of any excessive contribution is a violation of Section 441a(f).  
4 Finally, a committee's failure to report receiving a contribution is a violation of Section 434(b).

5 Consequently, if the payment to the Hamptons was, at least in part, a payment for, among  
6 other things, the loss of Cynthia Hampton's job as treasurer to the Ensign Committees, then the  
7 amount attributable to that purpose that exceeds the Act's contribution limits would be an  
8 excessive contribution that the Ensign Committees were not permitted to accept.<sup>82</sup> And the  
9 Ensign Committees' failure to report the contribution would be a violation of its disclosure  
10 obligations under the Act.<sup>83</sup> Thus, the central question in this case is whether the payment was,  
11 at least in part, a severance and therefore a contribution under the Act.

12 **C. The Payment Was a Severance Because it Was Meant to Compensate the**  
13 **Hamptons for the Loss of Their Jobs with Senator Ensign's Office and the**  
14 **Ensign Committees**

15 The available information demonstrates that Senator Ensign wanted to provide funds to  
16 the Hamptons, in part, to ease Cynthia Hampton's transition from her position with the Ensign  
17 Committees.

18 In MUR 6200, the Commission looked to *Commissioner of Internal Revenue v.*  
19 *Duberstein*, 363 U.S. 278 (1960), a case interpreting the statutory meaning of "gift" under the tax

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<sup>80</sup> *Id.* § 441a(a)(1)(A). During the 2007-2008 election cycle, the limit on individual contributions to candidates was \$2,300 per person. See FEC, *Contribution Limits for 2007-2008*, Party Guide Supplement at 16 (Aug. 2007), available at [http://www.fec.gov/info/PartyGuide/party\\_guide\\_supp.pdf](http://www.fec.gov/info/PartyGuide/party_guide_supp.pdf).

<sup>81</sup> 2 U.S.C. § 441a(a)(1)(C).

<sup>82</sup> *Id.* §§ 441a(a) and (f).

<sup>83</sup> *Id.* § 434(b).

1 code, for guidance in determining whether a particular payment should be treated as a personal  
2 gift or a campaign contribution under the Act. In *Duberstein*, the Supreme Court concluded that  
3 the term “gift” has a specific meaning in the tax code and that determining whether a payment is,  
4 in fact, a gift for federal tax purposes requires an objective inquiry to determine what the  
5 payment actually was, regardless of what the payor might have called it:

6 A gift in the statutory sense . . . proceeds from a detached and disinterested  
7 generosity, . . . out of affection, respect, admiration, charity or like impulses. And  
8 in this regard, the most critical consideration, as the Court was agreed in the  
9 leading case here, is the transferor’s intention. What controls is the intention with  
10 which payment, however voluntary, has been made.

11 . . . .

12 *The donor’s characterization of his action is not determinative—. . . there must be*  
13 *an objective inquiry as to whether what is called a gift amounts to it in reality. It*  
14 *scarcely needs adding that the parties’ expectations or hopes as to the tax*  
15 *treatment of their conduct in themselves have nothing to do with the matter.*<sup>84</sup>

16 Notably, the *Duberstein* Court was careful to explain that by using the word “intention” it was  
17 referring to “the basic reason for his [the payor’s] conduct in fact—the dominant reason that  
18 explains his action in making the transfer.”<sup>85</sup> And thus the question is “basically one of fact, for  
19 determination on a case-by-case basis.”<sup>85</sup>

20 Guided by *Duberstein*’s discussion of a fact-based objective inquiry, the Commission  
21 previously said, “In addition to [the Ensigns’] affidavits, the Commission may consider other  
22 evidence, including the circumstances in which the payment was made, to discern the Ensigns’

<sup>84</sup> *Duberstein*, 363 U.S. at 285-86 (citations and internal quotation marks omitted) (emphasis added).

<sup>85</sup> *Id.* at 286. Thus, *Duberstein* does not necessarily require an inquiry of the transferer’s precise legal *mens rea*—i.e., intention or motivation—as may be required in other contexts, but rather calls for a broad consideration “based ultimately on the application of the fact-finding tribunal’s experience with the mainsprings of human conduct to the totality of the facts of each case.” *Id.* at 289.

<sup>86</sup> *Id.* at 290.

1 intent.”<sup>87</sup> With the benefit of substantial new evidence, a *Duberstein*-like objective inquiry leads  
2 the Commission to the conclusion that the dominant reason for the \$96,000 payment was to  
3 compensate the Hamptons for having to sever their employment relationship with Senator Ensign  
4 and the Ensign Committees. There is strong evidence that it was a “severance payment”—i.e., a  
5 “payment by an employer to employee beyond his wages on termination of his employment.”<sup>88</sup>

6 *First*, the evidence shows that the payment was meant to help the Hamptons after losing  
7 their jobs with the Ensign Committees (in Cynthia’s case) and Senator Ensign’s Senate office (in  
8 Doug’s case). Sharon Ensign testified that she and Michael Ensign knew about the job losses  
9 and were particularly concerned about the impact on the Hamptons’s children.<sup>89</sup> According to  
10 Senator Ensign’s journal, he also meant for the payment to compensate the Hamptons for their  
11 job losses and went to his father about it.<sup>90</sup> And Senator Ensign’s staff members and others  
12 testified that they recall Senator Ensign explaining that he had given the Hamptons money “to  
13 cover his salary and her salary and COBRA payments.”<sup>91</sup>

14 *Second*, it was Senator Ensign—the Hamptons’ employer—who was the driving force  
15 behind the payment. He negotiated the payment as part of an “exit strategy.”<sup>92</sup> They agreed on

<sup>87</sup> SOR at 10 (quoting *Duberstein*, 363 U.S. at 286).

<sup>88</sup> *Ass’n of Am. R.R.s v. Surface Transp. Bd.*, 162 F.3d 101, 104 (D.C. Cir. 1998) (internal citation omitted).  
*Cf. Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 4 (1987) (treating as “severance payment” a one-time,  
lump-sum payment to certain employees to assist them in economic transition in event of plant closure).

<sup>89</sup> Sharon Ensign Dep. at 45 (“[M]y husband suggested it. And . . . obviously, we knew about the affair and  
knew that . . . they were . . . obviously going to have to seek employment elsewhere. And just—it was the right  
thing to do so that . . . their children would not, you know, have to leave their schools . . .”); accord Michael  
Ensign Dep. at 81-82 (testifying he “had assumed” the Hamptons would no longer work for Senator Ensign).

<sup>90</sup> See Sharon Ensign Dep., Ex. SE-7 at 1; Michael Ensign Dep., Ex. ME-10 at 1 (“[F]inally all agreed that  
Doug and Cindy would have to leave my employ. . . . [S]o I was going to help them transition into their new life.”).

<sup>91</sup> Ernestine Jackson Dep. at 223.

<sup>92</sup> See Cynthia Hampton Dep., Ex. CH-10.

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1 an amount—\$96,000—that was calculated based on the Hamptons’ salaries and an additional  
2 amount to cover lost healthcare benefits. Senator Ensign told Michael Ensign of his intention to  
3 pay the Hamptons. And it is reasonable to infer that it was this discussion that led to Michael  
4 Ensign’s direction to Bruce Hampton to issue a check to the Hamptons in the precise amount  
5 Senator Ensign had negotiated with Doug Hampton. Indeed, Senator Ensign told Cynthia  
6 Hampton he was sending her a check, suggested it was from him and his wife, and repeatedly  
7 followed up to make sure she received it—all of which indicates that Senator Ensign knew his  
8 parents had made a payment to the Hamptons.<sup>93</sup> So, while the check was signed by Bruce  
9 Hampton and drawn on the Ensign Trust account, the catalyst and prime mover was Senator  
10 Ensign, who negotiated the amount, discussed it with his parents, and then ensured the Hamptons  
11 received the check.<sup>94</sup> For this reason, Senator Ensign’s treatment of the payment as a severance  
12 is particularly probative of what the payment was in reality, regardless of what it was later called.

13 *Third*, Senator Ensign repeatedly referred to the payment as a “severance.” His journal  
14 calls it a severance.<sup>95</sup> Doug Hampton’s notes of his discussions with Senator Ensign call it a  
15 severance.<sup>96</sup> Testimony also reflects that Senator Ensign consistently referred to the payment as  
16 a severance in discussions with Cynthia Hampton in April 2008 and again when he disclosed the  
17 relationship to his staff in June 2009, more than a year later. And Senator Ensign’s draft public

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<sup>93</sup> See *id.* at 203-04, 212.

<sup>94</sup> Indeed, even Senator Ensign’s counsel recognized that Senator Ensign was behind the payment—writing, for example, “*he made the payments*”—while also counseling that it not be called a severance for strategic reasons. Report at 41 (emphasis added).

<sup>95</sup> See Michael Ensign Dep., Ex. ME-10 (journal entry referring to payment of “severance”).

<sup>96</sup> Cynthia Hampton Dep., Ex. CH-10 (Doug Hampton’s notes recording discussion with Senator Ensign of “severance” payment).

1 statement called it a severance.<sup>97</sup> The fact that Senator Ensign's lawyer advised him  
2 immediately before he made a public statement to stop referring to the payment as a severance  
3 because of the potential legal implications also strongly suggests that the present characterization  
4 of the payment as a gift is merely a *post hoc* legal position, which warrants little weight in an  
5 objective inquiry "as to whether what is called a gift amounts to it in reality."<sup>98</sup>

6 **D. The Respondents' Arguments that the Payment Was a Gift, Not a Severance,**  
7 **Are Not Persuasive**

8 In essence, the Respondents' various arguments boil down to the claim that the payment  
9 was meant as a gift instead of a severance. The record now before the Commission, however,  
10 does not support this claim. Instead, it supports the conclusion that the payment was meant to be  
11 a severance. Indeed, the only documentary evidence suggesting that the payment was a gift—  
12 Senator Ensign's counsel's public statement issued July 9, 2009, and Michael and Sharon  
13 Ensign's 2010 affidavits, each calling the payment a gift—were created long after the payment  
14 was made and are contradicted by earlier, often contemporaneous, documents as well as by  
15 sworn testimony.

16 The Sen. Ensign Response argues that the payment was a gift because the check was  
17 made out to the Hamptons and two of their children from the Ensign Trust account and was  
18 structured to provide each recipient with the maximum amount allowable under federal tax law.  
19 But, as the *Dubenstein* Court pointed out, "It scarcely needs adding that the parties' expectations  
20 or hopes as to the tax treatment of their conduct in themselves have nothing to do with the

<sup>97</sup> Report at 40 (discussing initial Ensign draft of public statement describing "severance pay" to Hamptons).

<sup>98</sup> *Dubenstein*, 363 U.S. at 286.

1 matter.”<sup>99</sup> Instead, what is important in determining whether a payment was a gift or a  
2 severance is whether the payment was rooted in “detached and disinterested generosity, . . . out  
3 of affection, respect, admiration, charity, or like impulses”<sup>100</sup> or, on the other hand, was meant to  
4 serve some other purpose, such as to lessen the impact of a job loss.

5 Here, the record shows that Senator Ensign, Sharon Ensign, the Hamptons, and several  
6 others understood that the payment was tied to the Hamptons’ lost employment. The amount of  
7 the check was the same as the amount Senator Ensign had negotiated with Doug Hampton after  
8 Senator Ensign had discussed with Michael Ensign his intention to pay a severance. And Doug  
9 Hampton was included as a recipient of the payment, even though he is someone for whom  
10 Michael Ensign does not appear to have much “affection, respect, [or] admiration,” while at the  
11 same time, the Hamptons’ third child was not included. Thus, the circumstances do not appear  
12 to indicate “detached and disinterested generosity”—they tend to show that the payment was a  
13 severance.

14 *Second*, the Respondents’ claim that Michael and Sharon Ensign paid for the Hamptons’  
15 Hawaiian vacation, which they argue supports the conclusion that the \$96,000 payment was part  
16 of a pattern of gift-giving to the Hamptons. But the documents Sharon Ensign produced to the  
17 Senate Ethics Committee do not show a gift given to the Hamptons; they show that Sharon  
18 Ensign simply paid Senator Ensign’s credit card bill, which included expenses from the

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<sup>99</sup> *Id.* at 286.

<sup>100</sup> *Id.*

1 Hawaiian trip.<sup>101</sup> \$96,000 was nearly double the size of the entire Hawaiian vacation and three  
2 times as much as the asserted value of the Hamptons' share of that trip.

3 *Third*, Respondents argue that Senator Ensign's and others' characterizations of the  
4 payment as a severance are not determinative and, because there is variation among witnesses  
5 about the terms of the alleged severance, they are not reliable indicators of the purpose of the  
6 payment. The depositions, however, are consistent in showing that the payment made to the  
7 Hamptons was meant to compensate them for the loss of their jobs.<sup>102</sup> Available documents—  
8 including the draft public statement and Senator Ensign's journal entry—reflect that the payment  
9 was meant as a severance and that Senator Ensign discussed the payment with Michael Ensign  
10 before the payment was made. This conclusion is also supported by Senator Ensign's  
11 conversations with Cynthia Hampton in which he asked whether she had yet received the  
12 payment, thereby showing he knew of the payment beforehand. On the other hand, the  
13 characterizations of the payment as a gift emerged only in response to public scrutiny long after  
14 the payment was made. They therefore resemble *post hoc* rationalizations, which are of  
15 questionable reliability when weighed against the substantial volume of evidence tending to  
16 show that the payment was meant to compensate the Hamptons for the loss of their jobs.<sup>103</sup>

<sup>101</sup> Notably, Respondents do not explain why the Hamptons' participation in the Hawaiian vacation was worth \$30,000, and the Ethics Committee concluded that this valuation was inconsistent with other evidence showing that the trip for 16 people cost around \$43,000. See Report at 44-45 (noting inconsistency particularly since Hamptons traveled on same family jet as the other vacationers and stayed in a home rented for Ensign's brother and his family).

<sup>102</sup> Cynthia Hampton Dep. at 202-03; Ernestine Jackson Dep. at 223; Pamela Thiessen Dep. at 17.

<sup>103</sup> See *La Botz v. FEC*, No. 11-1247, 2012 WL 3834865, \*6-8 (D.D.C. Sept. 5, 2012) (reversing and remanding Commission decision relying on affidavit not supported by personal knowledge and contradicted by other contemporaneous written evidence).

**E. \$72,000 of the \$96,000 Payment Is Attributable to Cynthia Hampton's Lost Job with the Ensign Committees**

As discussed above, an objective inquiry into the nature of the \$96,000 payment indicates that it was a severance, but only the portion of that payment related to Cynthia Hampton's lost job with the Ensign Committees would be a contribution under the Act. Based on Cynthia Hampton's deposition testimony, notes from Doug Hampton's conversation with Senator Ensign, and the Report, the Commission understands that approximately \$50,000 of the total payment represented one year's salary for her, approximately \$24,000 represented two months' salary for him, and the balance—\$22,000—represented a payment for her lost health insurance.<sup>104</sup>

Given its size, the Cynthia Hampton severance payment exceeds four separate contribution limits—the Michael and Sharon Ensign's per-person limits for the two Ensign Committees—by a total of \$57,400 (\$50,000 severance amount, plus \$22,000 health insurance amount, minus \$14,600 combined contribution limit), as follows:

<sup>104</sup> The Sen. Ensign Response argues that, because of its size, the payment would have violated the personal use regulations at 11 C.F.R. § 113.1(g)(6) if the Ensign Committees had treated it as an in-kind contribution. The evidence of negotiation between Doug Hampton and Senator Ensign and Senator Ensign's subsequent discussions with Cynthia Hampton reveal that part of the \$96,000 sum was meant as severance for Cynthia Hampton's lost employment with the Ensign Committees and the remainder was for Doug Hampton's lost employment. As discussed, the relevant amount under the Act is based on the amount attributable to Cynthia Hampton's severance—\$72,000—which is a cost of the Ensign Committees, and therefore related to Senator Ensign's candidacy (*i.e.*, not irrespective of it), so the Commission does not find reason to believe that there was a personal-use violation.



	Contribution to Senator Ensign and Ensign for Senate	Contribution to Battle Born PAC	Total
	\$2,300 per-person limit	\$5,000 per-person limit	
Michael Ensign	\$10,000	\$18,000	\$36,000
	\$15,700 over limit	\$13,000 over limit	\$28,700 exceeds limits
Sharon Ensign	\$18,000	\$18,000	\$36,000
	\$15,700 over limit	\$13,000 over limit	\$28,700 exceeds limits
Total	\$36,000	\$36,000	\$72,000
	\$31,400 over limit	\$26,000 over limit	\$57,400 exceeds limits

In addition, the Ensign Committees were required to disclose these in-kind contributions on the contribution and disbursement schedules of their disclosure reports filed with the Commission, in accordance with 11 C.F.R. § 104.13(a), but they did not do so.

### III. CONCLUSION

Based on the available record and for the reasons described above, the Commission finds reason to believe that Senator Ensign<sup>105</sup> and the Ensign Committees knowingly accepted excessive contributions in violation of 2 U.S.C. § 441a(f). The Commission also finds reason to believe the Ensign Committees failed to report the contributions in its disclosure reports filed with the Commission, in violation of 2 U.S.C. § 434(b).

<sup>105</sup> In light of his key role in negotiating, arranging, and confirming receipt of the \$96,000 payment, there is reason to believe that Senator Ensign himself violated 2 U.S.C. § 441a(f), and the Ensign Committees' liability flows from his actions.

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